DECLARATION OF JUDGE DONOGHUE

1. In this declaration, I offer some observations with respect to the Court's decision to reject the Respondent's preliminary objections to the Court's jurisdiction *ratione materiae*, with which I agree.

2. When an applicant seeks to base the jurisdiction of the Court on a treaty, a respondent that makes a preliminary objection to the Court's jurisdiction *ratione materiae* can be expected to ground its objection not only on jurisdictional provisions, but also on substantive provisions of the treaty at issue, such as definitions and provisions setting out the rights and obligations of parties. Substantive provisions are, of course, also interpreted when the Court considers the merits. In the context of a preliminary objection, the distinction between a question of jurisdiction and a question of the merits has important consequences. Upon the filing of a preliminary objection, the proceedings on the merits are suspended (Article 79, paragraph 5, of the Rules of Court of 14 April 1978 as amended on 1 February 2001). The Court may decide a jurisdictional question but not a question on the merits.

3. Despite the importance of the distinction between questions of treaty interpretation that determine the scope of the Court's jurisdiction *ratione materiae* and those that instead are part of the merits, I am aware of no single phrase that neatly describes the boundary between the two. The distinction is drawn by the Court, informed by the positions of the parties, based on the particulars of each case.

4. If the Court finds that a preliminary objection is premised on a question of treaty interpretation that is part of the merits, it must reject the objection, leaving the question to be decided on the merits.

5. If, on the other hand, the Court finds that a preliminary objection presents a question of its jurisdiction *ratione materiae*, it has the options of rejecting the objection, upholding it, or deferring the question of jurisdiction to be considered during the merits phase, on the basis that the objection does not possess, in the circumstances of the case, an exclusively preliminary character (Article 79, paragraph 9, of the Rules of Court of 14 April 1978 as amended on 1 February 2001). Parties often invoke this third option as an intermediate fall back to their primary positions on a preliminary objection. However, for the reasons set out by two Members of the Court in a recent separate opinion, the Court should normally uphold or reject a preliminary objection and should only choose this third option when there are clear reasons to do so. (See *Certain Ira-*

nian Assets (Islamic Republic of Iran v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019*, joint separate opinion of Judges Tomka and Crawford.) The Court has followed this approach today.

6. The Court has used various formulations to frame the test that it follows in order to decide whether to uphold or reject an objection to its jurisdiction *ratione materiae*. In 1996, when presented with the question whether a bilateral treaty gave the Court jurisdiction to decide the applicant's claims, the Court stated that it

> "cannot limit itself to noting that one of the Parties maintains that . . . a dispute exists, and the other denies it. It must ascertain *whether the violations of the Treaty . . . pleaded by [the Applicant] do or do not fall within the provisions* of the Treaty and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain" (*Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 810, para. 16; emphasis added).

7. The Court recalled this formulation in *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment, I.C.J. Reports 2018 (I)*, p. 308, para. 46, in which it stated that it

> "must ascertain whether the violations [alleged] . . . do or do not fall within the provisions of the Treaty and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain . . . (*Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 810, para. 16)".

8. In *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France)*, the Court went on to use other formulations to frame its inquiry into its jurisdiction *ratione materiae*. It stated, for example, that it would decide whether the two "aspect[s] of the dispute" between the parties in that case were "*capable* of falling within the provisions" of the two treaties invoked by the applicant (*I.C.J. Reports 2018 (II)*, p. 315, paras. 69 and 70; emphasis added) and whether the "actions by [the Respondent] of which [the Applicant] complain[ed] [were] *capable* of falling within the provisions of" the treaty at issue (*ibid.*, p. 319, para. 85; emphasis added).

9. The Court's most recent statement of the test that it uses to determine its jurisdiction *ratione materiae* appears in *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019*, p. 23, para. 36, where the Court stated that it

> "must ascertain whether the *acts of which [the Applicant] complains fall within the provisions* of the Treaty . . . and whether, as a conse-

> quence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain . . . (*Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, pp. 809-810, para. 16)" (emphasis added).

The Court has used this formulation again today (Judgment, para. 57).

10. I do not understand each of these various formulations to suggest inconsistencies in the criteria that the Court applies to decide on an objection to its jurisdiction *ratione materiae*. Under the approach first articulated in *Oil Platforms*, once the Court finds that there is a dispute between the parties, it must examine the acts of which the applicant complains (in other words, the facts that it alleges) in relation to the rights and obligations contained in the treaty. The Court does not need to determine whether there is proof of the facts alleged by the applicant, or even whether the alleged facts are plausible, in order to decide a question of its jurisdiction *ratione materiae*. The weighing of evidence is left for the merits. On the other hand, the Court must form a view as to the scope of treaty provisions in relation to the acts alleged by the applicant in order to uphold or reject an objection to its jurisdiction *ratione materiae*. The way that it expresses its conclusions about the interpretation of the treaty will inevitably vary depending on the particulars of the case.

11. The recent Judgment in *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France)* illustrates a situation in which the Court upheld one of the respondent's preliminary objections to its jurisdiction *ratione materiae.* The Court reached this decision in relation to claims said to arise under the United Nations Convention against Transnational Organized Crime after analysing the parties' respective interpretations of that convention (*Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment, I.C.J. Reports 2018 (I)*, p. 323, para. 102 and p. 328, paras. 117-118). In such a situation, it can be said that the acts of which the applicant complains are not capable of falling within the provisions of the treaty, even assuming that the facts alleged by the applicant could be proven. The Court gives a definitive answer to a disputed question of treaty interpretation, which cannot be reopened in the case.

12. The situation is more complicated and more delicate when an objection to jurisdiction *ratione materiae* is rejected, such that the claims at issue proceed to the merits. This is the case today. The Court has rejected each of three grounds on which the Respondent objected to jurisdiction *ratione materiae*. I offer observations below on the two grounds of objection related to the International Convention for the Suppression of the Financing of Terrorism (hereinafter "the ICSFT") — the required "mental elements" and the meaning of the phrase "any person". I then address the objection to jurisdiction *ratione materiae* under the Interna-

tional Convention on the Elimination of All Forms of Racial Discrimination (hereinafter "CERD").

13. As the Court explains in paragraph 63 of the Judgment, it has rejected the aspect of the first preliminary objection based on the Respondent's proposed interpretation of the provisions of Article 2, paragraph 1, of the ICSFT that address intention, knowledge and purpose (which the Court describes as "mental elements"). It has decided that the Parties' differing interpretations of these aspects of Article 2, paragraph 1, are not relevant to the Court's jurisdiction *ratione materiae* but are matters to be addressed as part of the merits of the case. Such issues have a character similar to the interpretation of the elements of intent that are necessary to a finding of genocide under the Convention on the Prevention and Punishment of the Crime of Genocide, which the Court addressed as an aspect of the merits, not as a question of jurisdiction *ratione materiae* (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 121, paras. 186-187; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015 (I)*, p. 62, para. 132). Today's Judgment on preliminary objections does not set out the Court's interpretation of the "mental elements" provisions of Article 2, paragraph 1.

14. The Court has also rejected the aspect of the first preliminary objection that is based on the Respondent's interpretation of the phrase "any person" in Article 2, paragraph 1, of the ICSFT.

15. In the Respondent's view, the phrase "any person" must be interpreted to exclude State officials. On this reading of the ICSFT, alleged violations of the ICSFT predicated on the alleged financing by State officials would be excluded from the Court's jurisdiction *ratione materiae*.

16. The Applicant maintains that the interpretation of this phrase is a matter for the merits. Even if the Respondent's objection concerns jurisdiction, the Applicant argues that the objection lacks an exclusively preliminary character and, in any event, that the Respondent's interpretation of "any person" is incorrect. According to the Applicant, the phrase "any person" encompasses anyone, whether private individuals or State officials.

17. The Court has properly treated the interpretation of the phrase "any person" as a question that informs the scope of its jurisdiction *ratione materiae*, not as a question to be decided on the merits. Its decision as to this aspect of the Respondent's first preliminary objection has enormous significance for the scope of the case that proceeds to the merits. Much of the conduct that the Applicant characterizes as the financing of terrorism appears to have been undertaken by individuals who (according

to the Applicant) were officials of the respondent State. Had the Court upheld the Respondent's first objection to jurisdiction on the basis of the Respondent's interpretation of the phrase "any person", a much more limited case would have advanced to the merits. The interpretation of the phrase "any person" is purely a question of law. It has been fully briefed by the Parties. There is no basis to conclude that the jurisdictional objection lacks an exclusively preliminary character. It is therefore appropriate for the Court to decide today whether to uphold or reject this element of the Respondent's preliminary objections.

18. I agree with the Court's decision today that the term "any person", as used in Article 2, paragraph 1, of the ICSFT, does not exclude State officials.

19. As the Respondent stresses, the ICSFT contains no prohibition on State financing of terrorism. However, a State can only act through individuals. If officials whose conduct is attributable to a State fall within the scope of the phrase "any person", a State party has an obligation to punish and to prevent certain conduct in which its own officials engage in the course of their duties. It follows that, even though negotiating States refrained from including a prohibition on State financing of terrorism in the Convention, they nonetheless adopted a text that has substantively similar consequences for States parties to the ICSFT. As the Respondent points out, this is an odd result.

20. Nonetheless, the phrase "any person", in its ordinary meaning, admits of no limitation. The Respondent asks the Court to imply an exception that cannot be found in the text. When the plain language of a treaty provision is unambiguous, as is the case here, an exception to that provision could only be implied if the rules of treaty interpretation pointed convincingly to such an exception. Having studied the detailed presentations made by the Respondent on the interpretation of "any person", I see no basis to imply an exception that is at odds with the ordinary meaning of the phrase.

21. In today's Judgment, the Court rejects the Respondent's interpretation of the phrase "any person" and accepts the interpretation advanced by the Applicant. It has decided for purposes of the present case this question of treaty interpretation.

22. The Court has also rejected the Respondent's objection to the Court's jurisdiction *ratione materiae* under CERD. However, the basis for the Court's decision as to CERD differs from the basis on which the Court rejected the Respondent's "any person" objection in relation to the ICSFT. This difference in reasoning leads to different implications for future proceedings in this case.

23. The Application presents wide-ranging claims that are said to arise under CERD, as summarized in the Judgment (paras. 88-90). In the main, the Applicant does not complain of *de jure* discrimination against protected groups. It instead alleges "discrimination manifested through the disparate impact or effect of facially neutral laws or regulations" (Memorial of Ukraine, para. 566), contending that the Respondent has implemented measures "the purpose or effect of which is to generate racial discrimination" (*ibid.*, para. 587). The Court has correctly observed that the rights and obligations under CERD that are invoked by the Applicant are broadly formulated and that the list of rights in Article 5 is not exhaustive. The Court cites the breadth of these CERD provisions, together with the need to assess evidence regarding the purpose and effect of the measures about which the Applicant complains, as reasons to reject the Respondent's objection to jurisdiction *ratione materiae* under CERD (Judgment, paras. 94-96). It concludes that the measures of which the Applicant complains are "capable of having an adverse effect on the enjoyment of certain rights protected under CERD" (*ibid.*, para. 96).

24. I agree with the Court that these aspects of the Applicant's pleaded case contribute to the reasons why the preliminary objection as to jurisdiction *ratione materiae* under CERD should be rejected. An additional consideration is the manner in which the Respondent chose to frame its objection in relation to CERD. The Respondent maintains as a general matter that the Applicant invokes rights and obligations that are not rights and obligations under CERD (Preliminary Objections submitted by the Russian Federation, Chap. VIII, Sect. II). It states that "a number of rights invoked by Ukraine" are not protected by CERD (*ibid.*, para. 327). For example, the Respondent addresses Article 5, paragraph *(e)* (v), of CERD, which refers to the "right to education and training". The Respondent states that this provision "does not include, as Ukraine alleges, an absolute right to education 'in native language'". According to the Respondent, the main goal of this provision is instead to ensure the right regardless of ethnic origin to have access to a national educational system without discrimination (*ibid.*, para. 329). However, the Respondent does not review the particular education-related measures of which the Applicant complains in order to support the proposition that those acts do not fall within the scope of the provision, as interpreted by the Respondent.

25. When the education-related measures of which the Applicant complains are examined in light of the Parties' respective observations about the scope of Article 5, paragraph *(e)* (v), it can be said that those measures are "capable" of falling within the provisions of the treaty (or, in the words of the Court today, to be "capable of having an adverse effect on the enjoyment of certain rights protected under CERD") (Judgment, para. 96). I reach a similar conclusion in respect of the other measures about which the Applicant complains, taking into account the way that each Party interprets the relevant CERD provisions. Accordingly, I con-

clude that the acts of which the Applicant complains fall within the provisions of CERD.

26. Today's Judgment does not set out the Court's interpretation of the provisions of CERD on which the Applicant relies. The rejection of the preliminary objection in relation to CERD does not mean that the Court has accepted the interpretations of that treaty advanced by the Applicant. The question whether the acts of which the Applicant complains give rise to violations of CERD will depend on interpretations of CERD to be made when the Court addresses the merits, as well as the Court's conclusions on the evidence.

27. Having considered the Respondent's objection to jurisdiction *ratione materiae* in relation to CERD, the Court has rejected it. This Judgment settles for purposes of this case the question of the Court's jurisdiction *ratione materiae* under CERD.

(Signed) Joan E. DONOGHUE.